Office - Supreme Court, U. S.
FILED
SEP 16 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 351

EMIL STEIN AND WILLIAM B. STEIN, *Petitioners*,

v.

PRESTON DELANO, Comptroller of the Currency, and L. M. REED, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN F. ANDERSON,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
A. Statement of facts	2
B. Discussion	4
C. Conclusion	9

CASES CITED.

Deitrick v. Greaney, 309 U. S. 190	3, 6
First National Bank of Atlanta v. Southern Cotton Oil Company, 86 Fed. (2nd) 33	4
Erie Railroad v. Tompkins, 304 U. S. 64	2
Hobbs v. McLean, 117 U. S. 567	4
National Bank of the Commonwealth v. Mechanics' National Bank, 94 U. S. 437	2
Port Newark National Bank v. Waldron, 46 Fed. (2nd) 296	5
Richmond v. Irons, 121 U. S. 27	2
Stein v. Delano, 121 Fed. (2nd) 975	3, 6
Sprague v. Ticonic National Bank, 307 U. S. 161	8
United States Savings Bank v. Morgenthau, 85 Fed. (2nd) 811; Certiorari denied 299 U. S. 605; Rehearing denied 301 U. S. 713	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 351

EMIL STEIN AND WILLIAM B. STEIN, *Petitioners*,

v.

PRESTON DELANO, Comptroller of the Currency, and L. M. REED, Receiver of New Jersey National Bank and Trust Company of Newark, New Jersey, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Comes now Preston Delano, Comptroller of the Currency and L. M. Reed, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, the respondents in the above entitled case and present this their brief in opposition to the petition for writ of certiorari and in support thereof respectfully show:

A.

STATEMENT OF THE FACTS.

In February 1940, the Comptroller had paid the depositors and creditors of the insolvent New Jersey National Bank and Trust Company of Newark, New Jersey, 100 per cent of their claims pursuant to 12 U. S. C. 194, and his agent, the receiver, was proceeding with the orderly liquidation of the remaining assets which were insufficient to pay the full interest legally due the depositors and creditors. It had been settled doctrine since 1882, that the National Banking Act is a complete code by itself for the winding up of insolvent National banks. For more than sixty years the Comptroller had been paying interest on the claims of depositors and creditors of insolvent National banks, where the assets permitted, under this court's decisions in *National Bank of the Commonwealth* v. *Mechanics National Bank,* (1876) 94 U. S. 437, and *Richmond* v. *Irons,* (1887) 121 U. S. 27, and subsequent Federal Court decisions including *United States Savings Bank* v. *Morgenthau,* (1936) 85 Fed. (2nd) 811, 815, certiorari denied 299 U. S. 605, rehearing denied 301 U. S. 713. There were no decisions to the contrary. The annual reports of the Comptroller to Congress evidenced that such interest had been paid in more than four hundred National bank Receiverships. The Comptroller's practice in this connection as early as May 18, 1878, is evidenced by his letter of that date to the Receiver of the insolvent Commercial National Bank of Kansas City, Missouri (Appendix Page 10) which was appended to the Receiver's brief in the court below.

The present attorney for the petitioners visited the Office of the Comptroller on February 28, 1940, to demand that the remaining assets of the bank be surrendered to the shareholders, pursuant to 12 U. S. C. 197, without payment of any interest to depositors and creditors, on the ground that the law of New Jersey controlled the question since *Erie Railroad* v. *Tompkins,* (1938) 304 U. S. 64 and that the State law did not permit the payment of such interest under the cir-

cumstances of this case. After a general discussion of the law, during which the attorneys for the Comptroller referred to this court's decision in *Deitrick* v. *Greaney*, decided February 12, 1940, (309 U. S. 190) the attorney for the petitioners was advised that the demand would be considered.

On March 2, 1940 the petitioners' complaint was filed in the United States District Court (R. 48 in *Stein* v. *Delano*, No. 358, October Term, 1940, of this court, hereafter referred to as the basic suit). The complaint prayed that the Comptroller and the Receiver be enjoined from further retaining possession of the assets of the bank and from winding up its affairs and that a court Receiver be appointed to take possession of the assets. The complaint alleged (Basic R. 51):

> "Defendant Comptroller has refused to call a meeting of the shareholders of said association for the purposes mentioned in the preceding paragraph, in order that the assets now in the possession of the defendants might be paid over to said shareholders or their legal representatives in proportion to the stock by them respectively held; and *notwithstanding formal, written demand therefor has been made upon the office of the said Comptroller, the defendants insist upon their alleged right to continue in possession* of the assets of said association and to wind up its affairs *for the sole purpose of paying to the former creditors of said association interest upon their respective claims.*
>
> * * * * * *
>
> "*Unless this Court intervenes and enjoins said defendants* from continuing in possession of the assets of said association for the purpose of winding up its affairs and paying interest to the former creditors thereof upon their respective claims, *defendants, in accordance with their expressed intentions, will make such payments of interest from time to time*, and the recovery back from said various payees by the shareholders of said association will involve a multiplicity of suits and the expenditure of tremendous sums of money, all to the irreparable damage of plaintiffs, the association, and all the other shareholders thereof." (Italics ours.)

B.

DISCUSSION.

We submit that the petition for certiorari presents no valid ground for a review by this court. No question of public importance in the administration of the National Banking Act or of judicial administration pertaining to Federal equity jurisdiction is involved. We submit that the decision of the court below on the Federal question involved is in complete accord with, rather than in conflict with, the applicable decisions of this court.

The rule stated in this court's opinion in *Hobbs* v. *McLean*, (1886) 117 U. S. 567, 582, relied on with *First National Bank of Atlanta* v. *Southern Cotton Oil Co.*, (C. C. A. 5, 1936) 86 Fed. (2nd) 33, by the court below for its *per curiam* affirmance of the District Court's decision, appears to control this case:

> "When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees* v. *Greenough*, 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and *Central Railroad Co.* v. *Pettus*, 113 U. S. 116. *But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.*" (Italics ours.)

The petitioners, without invitation or suggestion from any representative of the depositors, filed the basic adversary proceeding to take possession of a fund held in trust by the

Comptroller of the Currency for those legally entitled to it (the depositors) in order that the fund might be distributed to those who claimed adversely (the stockholders). That attempt failed. Now petitioners who tried in vain to take that fund from the depositors are demanding reimbursement of their expenses out of the fund and a contribution from those whose property they "sought to misappropriate."

After this adversary proceeding was filed the representatives of the depositors co-operated, as in any other suit, looking toward limiting the issues, to minimize expense to depositors, and the avoidance of interference with the orderly liquidation. The decision of the attorney for the petitioners to limit the issue to the interest question was made only after he was advised that interference with the liquidation by the Comptroller's Receiver would be vigorously opposed, that a large bond would be sought to save the depositors against loss and after his attention was invited to the decision in *Port Newark National Bank* v. *Waldron,* (C. C. A. 3, 1930) 46 Fed. (2nd) 296, wherein the court below directed this District Court to oust its Receiver and restore control to the Comptroller's Receiver.

Petitioners refer to their action as "welcomed and fostered" by the Comptroller and Receiver. That the litigation was distinctly hostile is clearly evidenced by the complaint and particularly by the relief sought. The attorney for the petitioners, states in his affidavit filed in the court below (R. 7a), that he was examining the law as early as November 1939, and that various drafts of the proposed complaint were prepared. The Comptroller had no notice of the intention of the petitioners to sue until February 28, 1940, and suit was filed on March 2, 1940. Actually suit was filed before the Comptroller had an opportunity to formally reject the demand. (Comptroller's letter to petitioners' attorney dated March 1, 1940, Appendix page 11) Prior to the filing of the instant basic suit these petitioners had filed two suits against the Receiver (R. 22a), incident to their

vigorous resistance against payment of their large note and stock assessment obligations ultimately compromised for a small percentage of the amount due. (R. 23a.) The petitioners, through their present attorney, later attempted to interfere with the liquidation by seeking an order restraining the auction sale of remaining assets which was denied April 7, 1940. (R. 23a.)

The Comptroller considered the law settled at the time the instant suit was filed. This view was affirmed by the District Court and by the court below when it said in *Stein* v. *Delano,* (C. C. A. 3, 1941) 121 Fed. (2nd) 975, 978, "For the law is well settled and is with the Comptroller." Thereafter, the petitioners were unable to convince this court that a review should be granted in a certiorari petition and in two petitions for rehearing. In *Deitrick* v. *Greaney,* cited to the petitioners' attorney before the instant basic suit was filed this court said, 309 U. S. 190, 200:

> "A point much discussed in brief and argument, upon the assumption that local law will guide our decision, see Erie R. Co. v. Tompkins, 304 U. S. 64, is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see Board of County Commissioners of Jackson County v. United States, 308 U. S. 343, and cases cited. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question. Awotin v. Atlas Exchange National Bank, supra."

Certainly, the Comptroller and the Receiver had no good reason for welcoming or fostering additional litigation with these petitioners.

Respondents deny that the discussion on pages 5 and 6 of the petition fairly represents the arrangement between counsel prior to the hearing in the District Court. Respondents also deny the following statements at pages 6 and 12 of the petition:

> "* * * respondents stating that other National bank liquidations involving the same issues were awaiting the decision in this case before final distributions."
>
> * * * * * *
>
> "For example, the submission of the 'interest question' in the case at bar to judicial solution was deemed sufficiently important to the Comptroller of the Currency to hold up ultimate distribution until final judgment, not only in the instant case, but in the receivership of the First National Bank of Detroit where the surplus after the payment of 100% of principal to depositors amounted to about $25,000,000.00."

The Comptroller was not withholding payment of interest to the depositors of any insolvent bank when the instant basic suit was filed and he has not withheld the payment of such interest to the depositors of the First National Bank-Detroit or to the depositors of any other bank since this suit was filed. As a matter of fact no money is yet available to pay interest to the depositors of the First National Bank-Detroit because all of the proceeds of its assets are still being applied in reduction of the loan obtained thereon to pay the last dividend which made a total of 100 per cent on principal. To quote from page 2 of the Brief of Respondent in opposition to the petition for rehearing, No. 358, in this court, October, 1941:

> "2. Petitioner's statements, pages 2, 4 and 5 of the rehearing petition, that distribution of interest to depositors of other insolvent National banks is being withheld or has been withheld pending a final decision in the instant case are based on erroneous information. Interest dividends in addition to 100% principal have been paid the depositors of the following insolvent National banks by the Comptroller of the Currency since

March 2, 1940, the date the complaint was filed in the instant case:

First National Bank & Trust Company, Fleetwood, Pennsylvania
The National Bank of Bellows Falls, Vermont
The First National Bank of Pender, Nebraska
The First National Bank of Birdsboro, Pennsylvania
The Cumberland National Bank of Fayetteville, North Carolina
The National Bank of Windsor, Vermont
Northeast Savings Bank of Washington, D. C.
The First Inland National Bank, Pendleton, Oregon
The Peckville National Bank, Peckville, Pennsylvania
The First National Bank of Honaker, Virginia
The First National Bank of Paw Paw, Michigan
The County National Bank of Clearfield, Pennsylvania
First National Bank of Saegertown, Pennsylvania
The Bank of Pittsburgh, N.A., Pittsburgh, Pennsylvania
Farmers & First National Bank of New Castle, Indiana
California National Bank of Sacramento, California
The First National Bank of Marshall County at Plymouth, Indiana
The First National Bank of Burlingame, Kansas
The Essex National Bank of Haverhill, Massachusetts
The First National Bank in Salem, Oregon
The Citizens National Bank of Irwin, Pennsylvania."

The petitioners obtain no assistance from this court's decision in *Sprague* v. *Ticonic National Bank,* (1939) 307 U. S. 161, and the proceedings thereunder. There the successful petitioner was awarded his attorneys expenses out of earmarked funds held by the Receiver against which the petitioner had established a lien and thereby through the principle of *stare decisis* established like rights for other beneficiaries not parties to the suit. Here the petitioners failed in their effort to misappropriate the funds of an insolvent bank's depositors, which funds the petitioners had caused to be diminished by the payment of attorney fees and other expenses necessary to the successful defense. Also the litigation prevented the payment of an interim interest

dividend which will now be included in the final dividend. We submit that the action of the District Court here complained of was an exercise of its discretion within legal rules established by this court's decisions and that its action and the *per curiam* affirmance by the court below were plainly right.

C.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

JOHN F. ANDERSON,
Counsel for Respondents.